No. 15,376

IN THE

United States Court of Appeals

For the Ninth Circuit

JAY W. SELBY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
DONALD B. CONSTINE,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Statutes

Rules

Regulations

No. 15,376

IN THE

United States Court of Appeals

For the Ninth Circuit

JAY W. SELBY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231 and Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on June 6, 1956 for violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a) in that he knowingly refused to submit himself to induction (Tr. 3-4). He pleaded not guilty, waived jury trial (Tr. 6), and was tried by the Honorable Michael J.

Roche on August 27, 1956 (Tr. 5). Appellant thereafter was adjudged guilty (Tr. 6) and on September 4, 1956 was sentenced to a term of two years (Tr. 7-8). Appeal was timely made to this court from the judgment of conviction (Tr. 8-9).

STATEMENT OF FACTS.

Appellant first registered with Selective Service on July 18, 1950, and gave his date of birth as February 15, 1932 (File 1 and 2).[1]

Appellant's Classification Questionnaire was filed with his Local Board on April 17, 1951 (File 5). On page 2 of the Questionnaire, appellant stated that he was a member of a reserve component of the Armed Forces, to-wit, a seaman recruit in the Naval Reserve, having entered such component on April 3, 1951, and was at the time performing service by satisfactorily participating in scheduled drills and training periods (File 6). He made no claim that he was a minister or student preparing for the ministry (File 7), nor did he claim that he was conscientiously opposed to participation in war in any form (File 11).

On April 30, 1951, appellant was classified 1-A by the Local Board (File 12). In the Special Form for Conscientious Objector, filed with the Local Board

---

[1]"File" refers to appellant's Selective Service file which was appellee's exhibit No. 1 in evidence in the court below. The file numbers referred to are the handwritten uncircled numerals on the bottom of the various pages of the file. Where possible, the description and date of the particular documents mentioned will be set forth for the purpose of identification.

and dated July 14, 1952, appellant claimed (apparently for the first time) that because of religious training and belief he was conscientiously opposed to participation in both combatant and non-combatant training or service (File 26). He alleged further that he acquired the belief, which was the basis for his conscientious objection claim, early in 1951 (File 27). Appellant stated he relied on the Watch Tower Bible and Tract Society for religious guidance (File 27).

However, at a personal appearance before the Local Board on August 11, 1952, appellant stated he would only accept a ministerial classification, and would not be satisfied with a classification of 1-O as a conscientious objector (File 118). On the same date, the Local Board continued appellant's classification of 1-A (File 12).

On September 30, 1952, appellant wrote the Local Board stating he desired another personal appearance before the Board so that he might be reclassified 1-AO, a conscientious objector opposed to combatant service only (File 128). On November 3, 1952, at the personal hearing before the Local Board, appellant nevertheless requested a classification of 1-O and indicated he was again opposed to both combatant and non-combatant service (File 133). The Local Board, on the same day, continued the appellant in class 1-A, and refused to reopen the case (File 12 and 133).

The classification of 1-A was appealed and appellant's case referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objection claim.

On May 13, 1953, T. Oscar Smith, Special Assistant to the Attorney General, recommended in a letter addressed to the Appeal Board, that after consideration of the entire file and record, the claim of conscientious objection from both combatant and non-combatant training and service should not be sustained (File 161 and 162). The letter states that the Honorable Ernest E. Williams, Hearing Officer for the Northern District of California, was of the opinion that appellant had failed to sustain his conscientious objector claim (File 162). The Appeal Board classified appellant 1-A on June 18, 1953 (File 174).

On June 30, 1953, appellant was ordered to report for induction (File 168). Appellant refused to submit for induction on August 20, 1953 (File 178), and thereafter was indicted by the Grand Jury on October 21, 1953 (File 191). Appellant was found not guilty by United States District Judge O. D. Hamlin on January 13, 1954 (File 193).

On January 28, 1954, the Coordinator of District No. 3, Selective Service System, San Francisco, wrote appellant's Local Board indicating that the acquittal was based upon the Local Board's procedural failure to consider certain memoranda (File 160) furnished by neighbors of appellant to the Local Board, which memoranda had been considered by the Appeal Board (File 196).

On September 13, 1954, the Local Board classified the appellant 1-A (File 14).

At a personal appearance before the Local Board on October 11, 1954, appellant reported that he had

been a full time minister since September 1, 1954, and since that date had not worked at secular employment (File 215). Appellant claimed both a ministerial and conscientious objection classification (File 215). On the same date, the Local Board continued appellant in class 1-A (File 14).

Appellant appealed the classification of 1-A, and his case was again referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objection claim.

In a letter dated June 7, 1955, addressed to the Appeal Board, T. Oscar Smith, Special Assistant to the Attorney General, recommended that appellant's claim to conscientious objection be not sustained (File 229). The letter stated that Hearing Officer Ernest E. Williams, before whom the appellant appeared personally, accompanied by his father, concluded that "the registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity" (File 229). The letter further stated that the Hearing Officer concluded that "there is an absence of sincerity in the registrant's claim" (File 229).

According to this letter of June 7, 1955, appellant advised the Hearing Officer that if he were classified 1-O, he would be unwilling to engage in civilian work in lieu of induction (File 228). Appellant testified before Mr. Williams that at that time he devoted but 12 hours a month to preaching, and about 8 additional hours to study and preparation of religious talks (File 229). Appellant advised the Hearing Officer

that during 1954, he "pioneered" in Jehovah Witnesses ministry for about two months (File 228). Appellant conceded that he was unable to serve a longer period of time as a "pioneer" because it was necessary for him to make a secular living (File 228).

On August 18, 1955, appellant was classified 1-A by the Appeal Board (File 224), and on October 21, 1955, he was ordered by his Local Board to report for induction (File 241). Appellant again refused induction on November 1, 1955 (File 242) and was indicted for such failure on June 6, 1956 (Tr. 3-4).

It was stipulated at the trial that although ordered to report for induction, appellant refused (Tr. 13). It was further stipulated that a certified photostatic copy of the Selective Service file of appellant be marked, and introduced as government's exhibit 1 in evidence in place of the original file (Tr. 13). Appellant offered no evidence nor did he testify in his own defense (Tr. 26).

QUESTION INVOLVED.

Was there a basis in fact for appellant's classification of 1-A by the Appeal Board?

STATUTE INVOLVED.

The statute involved is set forth in the Appendix.

ARGUMENT.

THE APPEAL BOARD HAD BASIS IN FACT FOR DENYING APPELLANT EXEMPTION AS A CONSCIENTIOUS OBJECTOR, A CLASSIFICATION OF 1-O.

Appellant complains that the denial of a conscientious objector status, a classification of 1-O, by the Appeal Board and by the Department of Justice, in its recommendation to the Appeal Board, were without basis in fact and were arbitrary, capricious and contrary to law. Appellant apparently concedes that there was a basis in fact for denying the classification of 4-D, that of a minister or student preparing for the ministry.

(1) Lack of Sincerity is a Basis in Fact for Denying a Claim for Conscientious objection.

There has been in the past much litigation as to what constitutes a claim for classification as a conscientious objector, and what circumstances reflected in a registrant's file justifies a Selective Service board in denying such a claim. In other words, what evidence or basis in fact would permit a board to deny a claim of conscientious objection?

The courts have drawn a distinction, since the case of *Dickinson v. United States,* 346 U.S. 389 was decided, as to the susceptibility of proof between a claim for ministerial status and a claim of conscientious objection. While the question of whether a registrant is a minister may be a factual one susceptible of exact proof by evidence, the best evidence of conscientious objection is not the registrant's assertions or those of

his associates, but his sincerity, good faith, credibility and demeanor.

Witmer v. United States, 348 U.S. 375;
White v. United States, (9th Cir.) 215 F. 2d 782, Cert. den., 348 U.S. 970;
Tomlinson v. United States, (9th Cir.) 216 F. 2d 12, Cert. den., 348 U.S. 970;
Shepherd v. United States, (9th Cir.) 217 F. 2d 942, 220 F. 2d 885;
Campbell v. United States, (4th Cir.) 221 F. 2d 454.

The Supreme Court in *Witmer v. United States,* supra, confronted with the issue of what constituted a basis in fact for denial of a conscientious objector claim, held that any fact which casts doubt on the sincerity of the registrant is relevant in such cases, and is "affirmative evidence" that the registrant has not painted a complete and accurate picture. The court therefore held that the ultimate question is the sincerity of the registrant.

The court stated at pages 381 and 382 the following:

> "Here the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant.

> It is 'affirmative evidence . . . that a registrant has not painted a complete or accurate picture . . .' *Dickinson v. United States,* supra, p. 396."

The court further decided that a registrant claiming successive deferments on different grounds and making inconsistent statements concerning his claim of conscientious objection creates considerable doubt as to the sincerity of his claim and provides a basis in fact for the denial thereof.

This court, in September 1954, prior to the Supreme Court decision of *Witmer v. United States,* supra, had occasion to decide the two cases of *White v. United States,* (9th Cir.) 215 F. 2d 782, cert. den., 348 U.S. 970, and *Tomlinson v. United States,* (9th Cir.) 216 F.2d 12, cert. den., 348 U.S. 970, which clarified and set forth what standards may be considered in denying a claim of conscientious objection. In *White v. United States,* supra, this court pointed out that, in the determination of a registrant's belief and his sincerity therein, the best evidence on the question may well be his credibility and demeanor in a personal appearance before the local boards of the Selective Service System. In holding that the appeal board may take into consideration the fact that the local board had made a classification following its opportunity to observe the registrant's demeanor during his personal appearance, this court stated at pages 784 and 785:

> "The question before the local board had to do not with what religious organization or sect the

> appellant adhered to, nor what the teachings of that sect or organization was, but what was the sincere belief of this particular registrant and what was the extent of his conscientious opposition to military service. In other words, the local board initially, and the appeal board subsequently, were called upon to evaluate a mental attitude and belief. It is plain that when such matters are to be determined and passed upon, the attitude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as to the extent and quality of his beliefs. The local board, before whom the registrant appeared, had an opportunity surpassing that available to us or to the appeal board itself to determine and judge as to these matters."

Tomlinson v. United States, supra, holds that an appeal board may rely on the recommendation of the Department of Justice concerning a registrant's sincerity as a primary basis in fact for denying the claim of conscientious objection. This court stated at page 17:

> "In this instance it is plain that the appeal board's conclusion was based primarily upon the report of the hearing officer. Such a report may furnish the basis in fact which supports the board's action. *Kent v. United States,* 9 Cir. 207 F.2d 234, 237; *Roberson v. United States,* 10 Cir. 208 F.2d 166, 169. Its conclusions may also have been based in part upon that portion of the registrant's file which was transmitted with the appeal."

In addition, the court pointed out that objection to any governmental service is not an objection which the act recognizes and reflects directly upon the registrant's sincerity. The court stated at page 18:

> "The appeal board may well have been of the view that this registrant is primarily an objector who will have nothing to do with the affairs 'of this world.' True he is conscientiously opposed to killing; but his real objection to noncombatant service would appear to be its interfering with his carrying 'the message' and doing what he chose to call 'ministerial work.' We think that in drawing the line where it did, it cannot be said that the appeal board acted without basis in fact."

Thus, the Supreme Court, as well as this court, has held that the best evidence upon the question as to what a registrant claiming conscientious objection may believe or feel, is not his assertion or those of his associates, but his credibility and demeanor in personal appearances before the fact finders, the local board, and the Department of Justice Hearing Officer. Furthermore, an appeal board may rely for a basis in fact in denying a conscientious objector claim upon the report of the Hearing Officer forwarded through the recommendation of the Department of Justice, as well as the entire file of the registrant transmitted on appeal.

Appellant concedes that this court, in *White v. United States,* supra, (Appellant's brief 47) has declared the Selective Service boards may employ the subjective test in determining conscientious objection. *Appellant complains, however, that the statute and*

regulations give no such right to this court "so to speculate" (Italics added). Despite the volume of cases cited by appellant, it appears that he has completely disregarded the decision of the Supreme Court in *Witmer v. United States,* supra, and of this court in *Tomlinson v. United States,* supra.

What appellant therefore, seeks is a reversal by this court of the *Witmer, White* and *Tomlinson* cases, supra.

Nevertheless, an examination of appellant's Selective Service file, more fully discussed infra, reveals inconsistent statements, reversals of position, vague and uncertain assertions, membership in a military organization, objection to any governmental service whatsoever and claims of successive deferments and exemptions on different grounds.

Each of these factors has been considered in determining whether a registrant is sincere in his claim, and has been held in previous cases to form a basis in fact for questioning sincerity and denying a claim of conscientious objection.

Witmer v. United States, supra;
White v. United States, supra;
Tomlinson v. United States, supra;
Campbell v. United States, supra;
Borisuk v. United States, (3rd Cir.) 206 F.2d 338.

(2) The Evidence of Insincerity was Sufficient to Provide a Basis in Fact for Denying Claim of Conscientious Objection.

The burden is upon the registrant to establish his eligibility for deferment or exemption from military service to the satisfaction of the boards of the Selective Service System. The registrant has the burden to show clearly that he is entitled to classification as a conscientious objector. He cannot shift this burden of proof by his statement as to his belief.

Campbell v. United States, supra;

Gaston v. United States (4th Cir), 222 F. 2d 818;

Swaczk v. United States (1st Cir.), 156 F. 2d 17, Cert. den. 329 U.S. 726.

See also

Palmer v. United States (3rd Cir.), 223 F.2d 893, Cert. den. 350 U.S. 873.

The Department of Justice and the Local and Appeal Board found that the appellant had failed to establish his conscientious objection to combatant and noncombatant service arising out of religious training and belief. The government has set forth what it considers an objective Statement of Facts (supra) based on the Selective Service file itself and not colored with inference and argument. The facts contained in the file speak for themselves and establish a clear, substantial and reasonable basis for the denial in the last instance by the Appeal Board of the conscientious objection claim.

Appellant has placed considerable emphasis upon the numerous affidavits and statements of associates of

appellant filed with the Local Board. These statements were introduced obviously for the purpose of supporting a claim for ministerial deferment. Such claim was apparently abandoned prior to trial, and was not seriously urged in the court below.

The sole occasion appellant claimed full time activity as a minister was during a two month period in which a personal hearing was held before the Local Board on October 11, 1954, shortly before his second appeal (File 215). On that occasion appellant claimed both a ministerial and conscientious objector classification, but emphasized that he desired to be classified a minister. It is significant that in the hearing before the Department of Justice following his second appeal, as reported in the letter dated June 7, 1955, appellant conceded he had returned to secular employment and had "pioneered" for only two months in 1954 (File 228).

The Federal Bureau of Investigation resumé attached to the letter of June 7, 1955 (File 232 and 233) reveals appellant devoted in 1949 only seven hours of activity in the Jehovah Witnesses sect. His record reflected no activity during 1950, nor the first six months of 1951. He gave but a total of 27 hours through the remainder of 1951 and spent a total of 75 hours each in the years 1952 and 1953 in Jehovah Witness activity. Appellant in September 1954 spent 106 hours in Jehovah Witness work, and in October of that year a total of 88 hours. The resumé disclosed that appellant ceased his "pioneer" activities on November 1, 1954, upon his own request.

Therefore, the only real issue is whether there is a basis in fact for the denial of the conscientious objection claim since there is certainly no dispute that there was a substantial basis for denial of ministerial status.[2]

a. Inconsistent Acts and Claims.

Appellant's primary contact with his Local Board was the filing of his Classification Questionnaire on April 17, 1951 (File 5). He made no claim whatsoever that he was conscientiously opposed to war in any form (File 11) or that he was a minister or student preparing for the ministry (File 7). However, he stated he was a member of the Naval Reserve, having entered the component a few days previously on April 3, 1951 (File 6). It may reasonably be inferred that appellant at that point hoped for deferment upon the basis of this military service.

Appellant was classified 1-A by the Local Board on April 30, 1951 (File 12). The Local Board was thereafter advised that some question of conscientious objection was being urged by appellant. The board was notified on March 13, 1952, not by appellant but by the Government itself, that appellant had been dis-

---

[2]In *Reese v. United States* (9th Cir.) 225 F.2d 776, this court held that a person who irregularly or incidentally preaches and teaches the principles of a religion, or a person ordained a minister in accordance with the ceremonies of a church, but who does not regularly, as a vocation, preach the principles of that religion, is not included within the class of persons recognized by law "as regularly and duly ordained ministers of religion." See also *Dickinson v. U. S.*, supra and *Diercks v. U. S.*, (7th Cir.), 223 F.2d 12.

charged from the Naval Reserve for reason of "Convenience of the Government" (File 15).

Appellant on June 4, 1952 was ordered for an armed forces physical examination (File 21) and only after that order, which indicated imminent induction, did he file on July 14, 1952 his Special Form for Conscientious Objector (File 26). He therein claimed objection to both combatant and noncombatant service. It is noted that he claimed he acquired the basis for his conscientious objection belief "Early in '51 . . . had bible study in home and attended meetings at the Kingdom Hall . . ." (File 27). As stated previously, the investigation disclosed no Jehovah Witness activity for this period (File 233).

He made no explanation whatsoever for his failure to assert a claim for conscientious objection in his initial Classification Questionnaire, except to say that he joined the Naval Reserve "Early in '51 along with some school buddies" because "it seemed to be the only thing to do . . ." However, in a second Conscientious Objector form filed by appellant on September 28, 1954 (File 202), appellant alleged he acquired the basis for his conscientious objection belief not "Early in '51" but "from 1949 onward . . ." The investigation disclosed, as stated previously, appellant spent but 7 hours in Jehovah Witness activity in 1949 (File 233).

Regardless of whether appellant acquired his claimed belief in 1949 or early in 1951, he still had no hesitation in joining the Naval Reserve on April 3, 1951, at a time admittedly subsequent to his alleged

indoctrination. Furthermore, at a personal appearance before the Local Board on August 11, 1952, appellant stated he would not be satisfied with a classification as a conscientious objector and requested that he be classified 4-D, that of a minister of religion (File 118).

After receiving the Local Board classification of 1-A on August 11, 1952 (File 12), he wrote a letter dated September 30, 1952 indicating he had changed his mind and requested a personal appearance for the purpose of being classified 1-AO (File 128). Here appellant alleged he was now opposed to combatant service only, and would accept non-combatant service in the armed forces because he was "a law abiding citizen of this country . . ." This was not the only occasion appellant stated he would enter the military service. The file reveals that in an affidavit received by the Local Board on November 17, 1952 (File 144), appellant stated as follows: "That he reiterates his willingness to serve his country in noncombatant service if allowed access to that service without an oath of allegiance."[3]

---

[3]These facts are entirely contrary to appellant's assertions on page 25 of his brief that 'All of his papers, and every document supplied by him, staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended he was unwilling to go into the Armed Forces and do anything as a part of a military machine and that his objection was by reason of his religious training and belief."

In a letter dated October 7, 1952 (File 129), a Francis Silliman, under authority of appellant, requested a personal appearance for appellant stating, "Selby is a badly confused young boy. I suggest that you allow me to cite his Form 100 as a case in point. It denotes muddled and incoherent thinking and purpose. There is no direction to it at all." The letter further stated that appellant would be willing to accept a 1-AO classification, noncombatant service and training, if it were offered to him.

Notwithstanding appellant's assertion he would accept a 1-AO classification and enter the armed forces, he advised the Local Board at a personal appearance granted on November 3, 1952 (File 133) that he had again changed his mind, and desired a classification of 1-O, being then opposed to both combatant and noncombatant service. The board justifiably continued appellant in class 1-A on November 3, 1952 (Files 133 and 12).

Here appellant's assertions and conduct are entirely inconsistent, and standing alone provide a reasonable basis for denial of his claim of conscientious objection. As stated in *Witmer v. United States,* supra, on pages 382 and 383:

> "These inconsistent statements in themselves cast considerable doubt on the sincerity of petitioner's claim. This is not merely a case of registrant's claiming three separate classifications; it goes to his sincerity and honesty in claiming conscientious objection to participation in war. It would not be mere suspicion or speculation for the Board to conclude, after denying Witmer's

> now-abandoned claims of farmer and minister, that he was insincere in his claim of conscientious objection. Even firemen become dubious after two false alarms. Aside from an outright admission of deception—to expect which is pure naivety—there could be no more competent evidence against Witmer's claimed classification than the inference drawn from his own testimony and conduct. There are other indications which, while possibly insignificant standing alone, in this context help support the finding of insincerity."

The classification of 1-A of November 3, 1952 was appealed and appellant's file was forwarded to the Appeal Board.[4]

On March 20, 1953 (File 160) the Local Board prepared a memorandum containing information received from appellant's neighbors to the effect that appellant had boasted he was going to be smart and join the Jehovah Witnesses, and make money like some people did in World War II. This memorandum was never considered by the Local Board in classifying appellant, but was forwarded to the Appeal Board subsequent to the transmission of appellant's file on appeal. The procedural error resulted in appellant's acquittal on January 13, 1954 for refusal to submit to induction (File 193).

---

[4]Appellant failed to perfect his appeal within the time prescribed by regulation and claimed a mistake on his part; the file discloses that the Director of Selective Service Lewis B. Hershey filed an appeal on his behalf (File 148).

b. Hearing Officer Found Appellant Insincere.

After the defendant's acquittal, he was again classified 1-A by the Local Board on September 13 and October 11, 1954 (File 14). He appealed the classification and the Department of Justice in a letter dated June 7, 1955, recommended to the Appeal Board that appellant's claim of conscientious objection be not sustained. The Hearing Officer, according to the letter of June 7, 1955, found that the "registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity. He further concluded that there is an absence of sincerity in the registrant's claim" (File 229).

The Hearing Officer had appellant's entire file from Selective Service to examine. The file revealed inconsistent statements, reversals of position, claims for successive deferments, and membership in a reserve component of the armed forces. The Hearing Officer had a second opportunity to question appellant, observe his attitude and demeanor, and evaluate his mental attitude and belief. The Hearing Officer concluded well within the standards set forth in the cases of *Witmer v. United States, White v. United States,* and *Tomlinson v. United States,* supra, that appellant's claim for conscientious objection was insincere.

c. Objection to Any Governmental Service.

Appellant, according to the Department's letter of June 7, 1955 "told the Hearing Officer that if he were classified 1-O, he would be unwilling to engage in

civilian work for the Government, because to perform such a non-military service would be 'breaking his covenant with God, and would be a compromise of his covenant.' He added that although Jehovah Witnesses are not pacifists, they are opposed to war in any form and regard themselves as 'apart from the world and will have nothing to do with it, because the world is going to be destroyed.' "

Unquestionably what appellant is objecting to is service of any kind on behalf of a governmental agency. Appellant's conscientious objection is much broader than the one recognized by statute since it is in effect an objection to any governmental service whatever. Although admittedly appellant was not entitled to exemption as a minister, he indicated that even if given a conscientious objector classification of 1-O, he could not perform civilian work in lieu of induction if ordered to do so.[5]

As stated in *White v. United States,* supra, "Objection to serving a country, even on religious grounds, is not the standard under the statute." The court stated on page 785 as follows:

> "The language of the Act refers to a person 'who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.' There was evidence that White did not precisely fall into this category. For his con-

[5]A conscientious objector is subject to obligations under the Selective Service Act, the only difference being that he must serve his country in civilian work contributing to the maintenance of the national health, safety and interest in lieu of service and duty in the armed forces. *Niles v. United States,* (9th Cir.) 122 F. Supp. 383, 220 F.2d 278, cert. den. 349 U.S. 939.

> scientious objection was a broader one,—it was an objection to any governmental service whatever . . . After his appeal had been denied he wrote to the local board: 'Now if I go ahead and put my efforts toward doing governmental work, I will not be able to carry out my covenant obligations to God . . . I hope you can realize why I want to be exempted from being forced to do government work or being drafted into the armed forces.' He spoke of his belief that he 'should have no part in the doings of this old world even though (he) may be prosecuted for it.' . . . Thus, these boards might with reason conclude that they dealt with a registrant whose primary conscientious objection is to governmental activity."

The Appeal Board ultimately classified appellant 1-A on August 18, 1955. The Appeal Board had a basis in fact for denying the claim of concientious objection. Not only did it have the conclusion of the Hearing Officer that appellant's claim was insincere, and before whom the appellant personally appeared, but it could rely on the objective facts contained in appellant's entire file. Additionally, appellant had appeared before the Local Board for personal appearances on three occasions and had failed to convince the Board that he was a conscientious objector. There is both here a subjective and objective basis upon which to deny the claim of conscientious objection.

d. Appellant's Argument.

Appellant's argument concerning the Naval Reserve discharge is without merit. To enlist in a component of the armed forces requires a voluntary act

and is considered a privilege. Although the Navy was not compelled to discharge appellant, he was released apparently because of his assertion of conscientious objection.

The Naval Reserve did not presume to decide whether appellant was subject to induction through the processes of the Selective Service System, but only found he was not entitled to reenlistment. In any event, it is the Local Board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed.

Selective Service Regulation, 1622.1(c);
Universal Military Training and Service Act, Section 10(b)(3).

Appellant complains that a "glaring" omission appears in the Department of Justice recommendation to the Appeal Board of June 7, 1955 (File 227). He states that the Department's letter fails to include the comment of the Hearing Officer that appellant "has lived a clean and moral life."

A copy of the Hearing Officer's actual report, not a part of appellant's Selective Service file, but which was the basis of the Department's recommendation of June 7, 1955 was introduced as Government's Exhibit 2 in evidence without objection of appellant (Tr. 72). An examination of the report indicates the Department's summary of it was fair and inclusive.

Whether appellant has lived a "clean and moral life" is not an issue here, and, moreover, no claim is made to the contrary.

However, we agree with appellant's associate, that appellant is a "badly confused young boy" whose claims and assertions "denotes muddled and incoherent thinking and purpose" (File 129).

(3) Judicial Review is Confined to Determination of Whether Basis in Fact Exists for Denial of Conscientious Objector Claim.

Any exemption from military service because of conscientious objection to war is granted as a matter of grace.

Therefore, in the absence of a clear invasion of constitutional right, the courts have confined judicial review to a determination of whether there is any evidence or a basis in fact in the file of the registrant to support the classification.

Richter v. United States (9th Cir.) 181 F.2d 591 cert. den. 340 U.S. 892;

Uffelman v. United States (9th Cir.) 230 F.2d 297;

Campbell v. United States, supra.

As stated in *Witmer v. United States,* supra, at pages 380 and 381:

> "It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson v. United States,* 346 U.S. 389, 396 (1953). The classification can be overturned only if it has 'no basis in fact.' *Estep v. United States,* 327 U.S. 114, 122 (1946)."

CONCLUSION.

For the above reasons, the United States submits that no error has been shown in the conviction of appellant. He has received a fair trial and was properly convicted. A clear, convincing and substantial basis in fact existed for the classification of 1-A of appellant by the Appeal Board.

The judgment should be affirmed.

Dated, San Francisco, California,
July 17, 1957.

LLOYD H. BURKE,
United States Attorney,
DONALD B. CONSTINE,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

STATUTE

Section 6(j), Universal Military Training and Service Act, 50 U.S.C. App. 456(j) provides:

Conscientious objectors. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any

such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12

of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.